In the United States Supreme Court.

AMANDA M. S. WHITFIELD AND THE STATE OF MISSOURI, *ex rel.* HERBERT S. HADLEY, ATTORNEY GENERAL,

Petitioners,

v.

ÆTNA LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT,

Respondent.

No. 258.

Upon Certiorari to the Circuit Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR PETITIONER.

I.

The Circuit Court of Appeals intimated, without holding, that the Missouri statute only applied to an accident policy where the assured committed suicide while insane, because then only was there an accident.

Counsel seize and enlarge upon this suggestion, which really is the basis of the many misapprehensions below. In Logan *v.* Fidelity and Casualty Co. 146 Mo. 114, 119, 122, 123, 124, 126 the court said (p. 119) that the defense was, that death occurred by a pistol shot fired by the assured "while *either sane* or insane, in *either* of which events defendant was not liable except for the amount of the premiums paid ***." The opinion then holds (pp. 119, 122, 123, 124, 126) that the purpose of the statute was to create absolute liability if there was insurance against death in any contingency, and that the provisions in the policy as to *accidental* injuries did not affect the question.

In the Jarman case (44 C. C. A. 93, 104 Fed. Rep. 638, 642, 645) the question was whether the statute applied to a suicide by an insane person. The majority of the court, Judge Sanborn dissenting, held that it did. Here (187 U. S. 197, 199–202) Mr. Justice Brown in a vigorous opinion agreed with the majority below, among other things saying:

> "But we are of opinion that the word 'suicide' is not used in this statute in its technical and legal sense of self destruction by a sane person, but according to its popular meaning of death by one's own hand, *irrespective of the mental condition of the person committing the act.*"

II.

But defendant in error is in no position to assert this claim here, because the reply set forth (Rec. 17) that the suicide was committed while the insured was insane, and upon motion of defendant in error, (*id.*) this was stricken out, plaintiff in error at the time excepting and preserving (*id.*) a bill of exceptions. After having asked

to have stricken out the averment that the assured was *insane*, defendant in error cannot now assume the inconsistent position that the statute only applies in such a contingency. No rule is better settled than that a party cannot upon appeal occupy a position inconsistent with that adopted below, otherwise a party could "tread back and trip up the heels of the plaintiff on a defect which he would seem thus purposely to have omitted to notice in the outset of the controversy" (Holmes *v.* Braidwood 82 Mo. 610, 617; Slack *v.* Lyon 9 Pick 65).

III.

Ritter *v.* Mutual Life Ins. Co. 169 U. S. 139, is here and was below made the basis of an argument, that the statute is against public policy, but as pointed out in the Jarman case (187 U. S. 197, 201) when discussing the same question and reaching a different conclusion, the Ritter case applied to a contract, the court's ideas of public policy, but a statute like that in question in and of itself declared a public policy which no court could ignore.

IV.

If reversed, the case should be remanded with directions to enter judgment upon the findings for $5,000.00, with lawful interest from April 7, 1902. Such is the proper practice (Pullman Palace Car Co. *v.* Metropolitan Ry. 157 U. S. 112).

Respectfully submitted,

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HERBERT S. HADLEY,
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